In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1385

WERT LANELVIN AKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on February 6, 1967, and rehearing was denied on April 3, 1967. The petition for a writ of certiorari was not filed until May 12, 1967, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1]

In any event, the petition is without merit.

1. Petitioner was convicted after trial by jury in the Western District of Tennessee on five counts charging him with violating 18 U.S.C. 1952 by causing

[1] Petitioner asserts that the court of appeals granted his motion to stay its mandate until May 12, 1967, pending his application for a writ of certiorari (Pet. 2). The record does not so reflect, and in any event the time within which to petition for certiorari runs from the entry of "judgment" (Rule 22(2)), not from the entry of mandate.

the interstate transportation, from Chicago, Illinois to Memphis, Tennessee, of gambling supplies and equipment (dice, playing cards and poker chips) for use in the Turf Club, a gambling establishment operated by him in violation of Tennessee law. He was given concurrent sentences of five years on each count and fined a total of $10,000. His defense was entrapment. The evidence showed that his Chicago supplier had signed a consent agreement with the government undertaking not to distribute certain gambling supplies in interstate commerce, and had at the same time been informed by government agents that other equipment (including dice, playing cards and poker chips) could lawfully be distributed. It was petitioner's contention that the supplier, in passing this information along to him, thereby became an unwitting agent of the government and entrapped him into believing that he could obtain dice, cards and chips in interstate commerce without violating the law.

Petitioner, however, was not convicted of causing the transportation of items that are unlawful *per se,* but of causing the transportation of lawful items for the purpose of putting them to an unlawful use—use in a professional gambling establishment operated in violation of State law. The supplier was specifically informed that while interstate shipment of dice, cards and chips was not unlawful *per se,* such shipments would be unlawful if the items were to be utilized in a professional gambling operation (R. 283, 308), and the consent agreement in terms forbade the shipment of any item—in addition to those specifically proscribed—"which violates Section 1952, Title 18, United

States Code" (Pet. App. A6).[2] The supplier, in short, was told nothing by government agents from which petitioner could reasonably have deduced that he could, with impunity, use the facilities of interstate commerce to facilitate the carrying on of his unlawful gambling business.

Since there was thus no evidence supporting petitioner's claim of entrapment, he was not entitled to any instruction on the subject and cannot challenge the instruction that was given. See *Lopez* v. *United States*, 373 U.S. 427, 436. In any event, the instruction, when read as a whole (R. 335–337), accurately states the relevant consideraitons as outlined in *Sorrells* v. *United States*, 287 U.S. 435, 441–442, 451, and *Sherman* v. *United States*, 356 U.S. 369, 372–373.

2. Petitioner also contends that he was the victim of an unlawful search and seizure, in that the search warrant was unspecific, the supporting affidavit was insufficient and evidentiary items were seized. The affidavit, however, set forth the allegations of the agent-affiant that he had personally observed professional gambling in progress at the Turf Club, that petitioner had admitted to him that a gambling operation was carried on there, and that the agent had personally examined the records of the Chicago supplier, which disclosed numerous shipments of gambling supplies to petitioner in Memphis (R. 15–16). The warrant directed the search for and seizure of "gam-

[2] In placing his orders, petitioner did not inform the supplier that he was operating an illegal gambling establishment, and gave his private apartment rather than the Turf Club as the address to which the items were to be delivered (R. 285).

bling material, supplies, and certain paraphernalia, articles, and devices including dice, checks (chips), dice table layout cloths, dice sticks, racks, roulette tables, and other material used in the business enterprise involving gambling" (R. 10–11). And the items seized, gambling paraphernalia and weapons, were instrumentalities of the illegal operation (R. 17).[3] Petitioner's complaints about the search and seizure are thus without merit.

Moreover, during trial the government proved the interstate shipments of gambling paraphernalia by the testimony and records of the Chicago supplier (R. 268–277), the testimony and records of the REA Express manager in Memphis (R. 59–68), petitioner's signature on REA receipts (R. 78–82), and the testimony of the manager of petitioner's apartment house who had received C.O.D. packages for him from the Chicago supplier (R. 36–45). The F.B.I. agent who had made the affidavit for the search warrant testified during trial that he had observed professional gambling being carried on at the Turf Club and that petitioner had admitted to him that he operated a professional gambling establishment (R. 166–170, 173–174, 180–182). In the circumstances, the evidence obtained in the search was merely cumulative.

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[3] Professional gambling establishments commonly maintain a supply of weapons as a protection against hijacking (R. 109–116). But, even if not instrumentalities of crime, the weapons could still be lawfully seized. *Warden* v. *Hayden*, No. 480, O.T. 1966, decided May 29, 1967. The weapons were not introduced into evidence.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

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